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No. 160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

HARRY R. SMITH, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner, Harry R. Smith, respectfully asks this Court to grant him a rehearing of its order denying his Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, issued on October 12, 1964.

1. Reasons for Rehearing

We are not unaware of the heavy burden on counsel in a Petition for Rehearing. It is our belief, however, that in denying the original writ the Court may have relied upon a statement in the opinion of the Court of Appeals which is contrary to the record. Had that statement been correct it might have established a distinction between the facts in the case at bar and the decision of the United States Court of Appeals for the District of Columbia in *Fletcher* v. *United States*, 332 F.2d 724 (D.C. Cir. 1964), which we assert is in irreconcilable conflict with the decision of the Eighth Circuit in this case.

In the papers filed in the original Petition for Writ of Certiorari counsel did not point out this misstatement of the record by the Court of Appeals and this Court may well have relied on its correctness in denying certiorari. When that error is corrected, there remains no basis for distinguishing the facts in the case at bar from those in *Fletcher*.[1] In order to understand the effect of the error of the Court of Appeals and the similarity of the *Fletcher* case to the case at bar, a brief review of the facts is necessary.

Petitioner was convicted of the burglary of the Altoona State Bank, Altoona, Iowa, which occurred dur-

[1] The *Fletcher* decision was not brought to the attention of the Court in the original petition for certiorari filed in this case on June 6, 1964, because the *Fletcher* case was not reported until August 10, 1964. The *Fletcher* case was cited in petitioner's reply brief, filed August 22, 1964, after the petition and the Government's opposition had already been distributed to the Court. That reply brief, however, did *not* call the attention of the Court to the factual error in the opinion of the Court of Appeals.

ing the night of October 21-22, 1962. The evidence against petitioner was entirely circumstantial. That same night, a highway patrolman, who knew nothing about the bank burglary, attempted to stop the car in which petitioner was riding along with two other people. Instead of stopping, the car drove off closely followed by the patrolman. In the ensuing chase the automobile went off the road; the driver was killed. Petitioner and a man named Dalia, who was named in the indictment along with petitioner, were injured but survived. A search along the road behind the fleeing car disclosed a sack of burglar tools and also amounts of currency which were attached to deposit slips of the Altoona State Bank.

The prosecutor was not willing to rest his case against petitioner on this evidence. To bolster up the inferences which could be drawn from these circumstances, the prosecutor resorted to a device which is becoming increasingly common in criminal trials where an accomplice is involved.

Dalia had previously entered a plea of guilty to the charge in the joint indictment of himself and petitioner. In order to get that plea before the jury, the prosecutor asked that the court call Dalia as the court's witness, stating that "the Government feels this witness has information bearing on this case, but the Government in view of his implication is not prepared to vouch for him." He made no representation whether or not he knew or whether he had considered the likelihood that Dalia would invoke the Fifth Amendment. Objection by counsel for petitioner against the calling of Dalia under these circumstances was overruled.

As anyone would have anticipated from the position that Dalia was in,[2] Dalia invoked the Fifth Amendment on all questions asked by the prosecutor except that he stated his name, residence, and admitted that he had been involved in an automobile accident on the night of the bank burglary. The very reasonable expectation Dalia would invoke the Fifth Amendment was confirmed on the prosecutor's second question when Dalia invoked the Fifth Amendment, as to whether he had been known as Anthony Walters.

Immediately thereafter, the prosecutor sought to bring out the fact that Dalia had been indicted and had pleaded guilty of entering Altoona State Bank with the intent to commit a felony. Again, Dalia invoked the Fifth Amendment, but the Court ruled that he must answer. Dalia then admitted that he had pleaded guilty. Eliciting Dalia's plea of guilty before the jury had the same effct as if his confession had been admitted in evidence.

But even Dalia's guilty plea was not enough for the prosecutor. Apparently realizing that the jury might think that Dalia's plea of guilty did not *necessarily* implicate the petitioner Smith and certainly knowing at that time that Dalia would invoke the Fifth Amendment, the prosecutor went on asking questions linking petitioner to Dalia as an accomplice. He elicited from the witness after each question the damaging statement that the answer would incriminate him. The prosecutor inquired who was in the car with Dalia at the time of the accident on October 22, 1962; whether he knew petitioner Smith; how long he was in Iowa on the date of October 22, 1962; whether he left Chicago

[2] Dalia was a defendant in a pending state prosecution and still faced the possibility of a federal prosecution for conspiracy.

with the petitioner Smith; how long he was in Altoona, Iowa, on October 21, 1962, or the early morning of October 22nd; how long the petitioner Smith was in Altoona on those two nights; and whether Dalia entered the front door of the Altoona State Bank on that date (Tr. 237-240). Dalia answered all these questions by the invocation of his constitutional rights against self-incrimination. Taken together with Dalia's enforced admission of a plea of guilty, the questions and answers clearly implicated the petitioner Smith. Dalia's refusal to answer on the ground that truthful answers would incriminate him could only mean one thing to a man of common sense sitting on the jury: that Dalia and petitioner Smith were accomplices. Hence the inference drawn from Dalia's plea of guilty was enlarged to implicate petitioner Smith with him. The Government in this case deliberately strove for that effect and got it.

These facts make the decision in this case in complete conflict with *Fletcher* v. *United States*, as we show later in a point-by-point analysis of the two cases. But the Court of Appeals made a finding in its opinion which, if correct, might be the basis of distinction between this case and *Fletcher*. In *Fletcher* the United States Attorney felt that it was his duty to call the court's attention to the fact that the witness, who subsequently invoked the Fifth Amendment, might refuse to testify. 332 F.2d at 725. In the case at bar, the Court of Appeals found as a fact "the Government did not know what Dalia's testimony would be as it had made no inquiry from him prior to the time he was placed on the stand." (Petition for Certiorari, App. 17)

It strains credulity that the Government did not anticipate what the witness would do. However, when

counsel for petitioner tried to find out whether the Government had inquired what the petitioner would do, the court closed off this avenue of information.

> "Q. (By Mr. Lawyer) Mr. Dalia, did you or did you not advise anyone on behalf of the prosecution or an official of this court that you would refuse to testify prior to coming to Court yesterday?—
>
> "MR. LAWYER: I request the Court to instruct the witness to answer.
>
> "THE COURT: The Court will not require the witness to answer." (Tr. 273)

Certainly it became the duty of the prosecutor at this point to affirm or deny whether or not he had seen the witness or whether or not he reasonably anticipated that the witness would rely on his privilege against self-incrimination. If the prosecutor anticipated that the witness would refuse to answer by invoking the Fifth Amendment and under that belief called the witness, it would indicate that he intended to use the witness' refusal to answer as evidence against petitioner. Certainly if he had inquired of the witness what the witness was going to do, and the witness had informed him in advance that he was going to use the Fifth Amendment, the prosecutor's resort to this sort of testimony should be condemned.

Contrary to the statement of the Court of Appeals, the record is silent as to whether the prosecutor had conferred with the witness and what he anticipated. The burden of proof is certainly not on petitioner to justify the prosecutor's conduct. That burden is on the Government, since the matter was exclusively within the prosecutor's knowledge. In respect to this

issue, the Government made no explanation to the court. In the absence of such an explanation, it should be presumed that the prosecutor either knew or anticipated that the witness would take the Fifth Amendment. If so he was using the witness as a device to bring before the jury the damaging inferences which common sense men would draw from the witness' refusal to answer on the grounds that the answer might incriminate him.

The vice of presenting to the jury a witness who takes the Fifth Amendment is that it deprives the defense of any opportunity to cross-examine the witness. Therefore, it is impossible for the defense to rebut the implication that there were guilty dealings between the petitioner and the witness which the witness dare not expose without incriminating himself. All the defense gets on cross-examination is a further refusal to answer. Furthermore, the refusal of the witness to answer the cross-examiner's questions is likely to make as bad an impression on the jury as the refusal to answer the prosecutor's questions. For example:

> "Q. (By Mr. Lawyer) Mr. Dalia, I ask your whether or not you have any information which would bear on the innocence of Harry Smith sitting here to the left of me two persons down, this man sitting right here?—
>
> "MR. LAWYER: I request the Court to instruct the witness to answer.
>
> "THE COURT: The Court will not require the witness to answer." (Tr. 273)

The impression that this makes on a jury is that if the witness told the truth in answer to that question, it would implicate the petitioner as an accomplice.

The right of cross-examination is so completely destroyed by the device employed in this case that it would be better for the defense not to have attempted any cross-examination whatever.

Having established, we hope, that the court's finding that the prosecutor did not know what position the witness was going to take is in error, we will compare the situation in the *Fletcher* case and the case at bar point by point. We think this examination shows that there is an irreconcilable conflict between the decision in this case and *Fletcher*.

2. The Conflict of Decisions

The opinion of the Court of Appeals for the District of Columbia in the *Fletcher* case is set out in full in the Appendix to this Petition. In brief, the *Fletcher* case was a prosecution for robbery in which the Government alleged that the defendant and two companions hailed a cab, directed the driver to take them to a certain address, and on arrival beat and robbed him. One of the defendant's alleged companions, Anderson, was a juvenile who was found involved in the offense by the Juvenile Court of the District of Columbia and sent to the National Training School. At the commencement of the trial of Fletcher, the prosecutor informed the trial court that Anderson had indicated he would refuse to testify against Fletcher. The trial court appointed counsel for Anderson and ascertained that Anderson would invoke his privilege against self-incrimination. In the presence of the jury Anderson gave his name, address, and age. He thereafter invoked his constitutional privilege as to a series of questions by the prosecutor relating to Fletcher's presence with him on the night of the crime, whether

they had hailed a cab together, whether they had directed the driver to take them to a certain address, and whether on arrival they had attacked and robbed him. The court then halted the questioning and Anderson left the stand.

The Court of Appeals reversed Fletcher's conviction and held that "inferences from Anderson's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced Fletcher." (332 F.2d at 727). Petitioner's case is indistinguishable from Fletcher's on any material ground. Indeed, in so far as there are factual differences between the two, they make petitioner's a more compelling case for reversal of his conviction than was Fletcher's. Comparison of the features relied on for reversal in *Fletcher* with the facts of the present case demonstrates the clarity of the conflict:

Fletcher	*The Present Case*
1. "The Government knew, and the court also knew, that Anderson would refuse to testify upon his claim of the privilege under the Fifth Amendment."	After giving his name, the witness Dalia invoked the Fifth Amendment to the next question and to all questions thereafter relating to the offense. Thus, at least from the second question on, both the prosecutor and the trial court knew that Dalia would refuse to testify. Nevertheless, the prosecutor continued to ask question after question about the offense and Dalia's association with petitioner on the night in question. Moreover, the prosecutor never denied that he knew Dalia would be

Fletcher	*The Present Case*
	uncooperative when called to the stand, although he had numerous opportunities to do so. The statement of the court below that "The government did not know what Dalia's testimony would be as it had made no inquiry from him prior to the time he was placed on the stand." has no support in the record, as we have shown. In fact when counsel for petitioner asked Dalia whether he had advised the prosecution or any court official before coming to court that he would refuse to testify, the trial court refused to let the question be answered.
2. "The prosecutor asked a series of questions, which depicted the alleged offense in its entirety. The questions were not a 'few lapses' as referred to in [*Namet* v. *United States*, 373 U.S. 179 (1963)]."	The prosecutor also asked a series of questions covering the commission of the offense and the association and presence of the petitioner with Dalia at the time of the crime. The prosecutor repeatedly linked Dalia and the petitioner in his questions. Moreover, the prosecutor elicited, and the court required Dalia to answer, that he had pleaded guilty to the same crime with which petitioner was charged. The jury was also told that Dalia and petitioner were jointly indicted. In *Fletcher*, the jury was never told that Anderson had been found involved in the crime by the Juvenile Court.

Fletcher	*The Present Case*
3. "The testimony sought from Anderson was the principal source of support for the testimony of the Government's only witness, the cab driver, and thus, if the jury drew inferences from Anderson's refusal to answer, those inferences would have served that purpose."	The Government's case was even slimmer than in *Fletcher*, as an experienced trial lawyer or judge can readily discern. Not only was there no eyewitness to petitioner's participation, there was none to the crime itself—the Government could not even fix the time of its commission. There was no finding of any property taken from the bank on petitioner or any of his companions such as would support the inference arising from possession of recently stolen property. There was no finding of any instrumentalities of the crime on petitioner or any of his companions. The bag of tools, money and bank slips found on the highway were not seen to come from the automobile in which petitioner was a passenger. The flight of the automobile, itself a dubious index of guilt, see *Wong Sun* v. *United States*, 371 U.S. 471, 483 (1963) could not be attributed to petitioner in any event because he was not the driver. Since Dalia's guilty plea was not admissible against petitioner, as the trial court acknowledged, petitioner's assoication with Dalia could give rise to no legitimate inference of guilt. The danger of using the testimony sought from Dalia

Fletcher	*The Present Case*
	as a substitute for proof linking petitioner to the crime is self-evident.
4. "Anderson's refusals to testify were not incidents in the course of other admissible testimony given by him. He gave no other testimony. Save for the formalities, such as name, age and address, his refusals constituted the whole of his participation in the case."	The only questions by the prosecution which Dalia answered willingly were: his name; how he pronounced it; where he lived and how long he had lived there; whether he was involved in an accident on October 22, 1962, and where it occurred; whether he was taken to a hospital and where it was. As in *Fletcher*, all other questions related to Dalia's guilt of the offense with which petitioner was charged and petitioner's association and presence with him at the time of the crime.
5. "Anderson's refusals were not mere incidents in a long trial. The trial was a short one, actually occupying some six hours spread over parts of two days, and Anderson's part in it was a major feature of the proceeding."	The prosecution's case against petitioner took only two days to present. Petitioner's case lasted less than one day. Dalia appeared before the jury on two successive days, and his testimony came as the climax to the prosecution's case. The prosecution rested shortly after he left the stand.
6. "Although the court instructed the jurors that they should draw no inferences of guilt from Anderson's refusals, it added that the exercise by Anderson of his constitutional right 'does	Although the court instructed the jurors that they should not give any weight or consideration to Dalia's claim of the privilege against self-incrimination and that his guilty plea did

Fletcher	*The Present Case*
not mean by itself, of course, that this defendant is guilty.' The jurors might well have understood that statement to mean that Anderson's refusal might be considered along with other evidence as proof of Fletcher's guilt."	not give rise to any inference as to the petitioner's guilt, he invited them to consider Dalia's appearance on the stand against the petitioner by giving the instruction on evaluation of the testimony of an accomplice. Furthermore, the "naive assumption that prejudicial effects can be overcome by instructions to the jury . . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (concurring opinion of Mr. Justice Jackson).

In sum, even a cursory examination of the two cases shows that they are inescapably in conflict and that if Fletcher was unfairly prejudiced by what occurred in his case, prejudice justifying a new trial for petitioner is a moral certainty. Petitioner faces a 20-year sentence for a crime not involving violence and not against the person, on a conviction which would be followed by reversal in the District of Columbia as day follows night.

This is not a conflict of minor significance. The Eighth Circuit has taken a position contrary to that of a Court of Appeals which has vast experience and expertness in the administration of the criminal law and decides more criminal appeals than any other federal court.[3] If the Court of Appeals for the District

[3] 1963 Report of the Administrative Office of the United States Courts, p. 193.

of Columbia is wrong in its interpretation of the law as laid down by this Court, it is for this Court to say so. Petitioner submits that the Court of Appeals for the District of Columbia is right, and that it is the Eighth Circuit which requires correction by this Court.

3. The Importance of the Issues in This Case

This Court in the case of *Douglas* v. *State of Alabama*, No. 313, October Term 1964, has granted certiorari. In that case, a witness was put on who refused to answer, invoking the Fifth Amendment. Thereupon the prosecution read to the witness his confession implicating the defendant. This Court granted certiorari.

It would seem that if certiorari were granted in the *Douglas* case, it should also be granted in the case at bar. This would afford the Court an opportunity to clarify the entire situation with respect to the device, now so commonly used, of putting on a witness to take advantage of the effect before the jury of his refusal to answer on the ground of self-incrimination. In the *Douglas* case, a confession was used for that purpose. In the case at bar, its equivalent, plea of guilty, was introduced. And then, with full knowledge that the witness was going to refuse to answer, a series of questions was asked relating to the alleged participation of petitioner in this case with the witness who had pleaded guilty. If this Court is to review the *Douglas* case, it should not neglect the opportunity to clarify the law by reviewing the parallel issue in a very closely similar situation.

Furthermore, if *Douglas* is to delineate the contours of a constitutional right, it would be ironic to deny

petitioner the opportunity to demonstrate its applicability to his case simply because his petition came to this Court too soon. And it would be an intolerable paradox if this Court, charged with the supervision of criminal justice in the Federal courts, should hold that the states are precluded by the Fourteenth Amendment from convicting a defendant in this fashion and yet leave standing a criminal conviction obtained in a Federal court in the same manner.

WHEREFORE, petitioner respectfully submits that this Court recall its order of October 12, 1964, denying certiorari in this cause, that it consider the questions raised in the Petition for Certiorari together with the similar question raised in *Douglas* v. *State of Alabama*, *supra*, in which this Court has granted its Writ of Certiorari, and that his petition for rehearing should be granted.

Respectfully submitted,

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Certificate of Counsel

Thurman Arnold, one of counsel for petitioners, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the Petition is restricted to the grounds as specified therein.

THURMAN ARNOLD